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2 (Pro Hac Vice application pending
3 AZ Bar # 07504, UT# 020805 WY# 8-6979)
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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NORTHERN CALIFORNIA**

9 BMR Heath Services Inc.,

10 Plaintiff,

11 vs.

12 UNITED STATES OF AMERICA,

13 Defendant.

No.:

COMPLAINT

14
15 Plaintiff, BMR Heath Services Inc; brings this action and alleges as follows:

- 16 1. This is an action arising under the internal revenue laws of the United States for the
17 recovery of the Employee Retention Credit denied and repayment assessed and
18 collected from Plaintiff.
19
20 2. Jurisdiction is conferred on this Court by Title 28, United States Code, Section
21 1346(a)(1), and Title 26, United States Code, Section 7422.
22
23 3. Plaintiff is a domestic corporation formed under the laws of the state of California, with
24 its principle place of business as 7041 Koll Center Pkwy Suite 210, Pleasanton, CA
25 94566.

- 1
- 2 4. The defendant is the United States of America.
- 3 5. On July 31, 2020, Plaintiff timely filed timely quarterly payroll taxes Form 941 for tax
- 4 periods: 2nd Quarter of 2020 with the Internal Revenue Service and paid the reported
- 5 thereon in the amount of \$308,340.93.
- 6 6. On October 31, 2020, Plaintiff timely filed timely quarterly payroll taxes Form 941 for
- 7 tax periods: 3rd Quarter of 2020 with the Internal Revenue Service and paid the
- 8 reported thereon in the amount of \$273,206.63.
- 9
- 10 7. On January 31, 2020, Plaintiff timely filed timely quarterly payroll taxes Form 941 for
- 11 tax periods: 4th Quarter of 2020 with the Internal Revenue Service and paid the reported
- 12 thereon in the amount of \$301,437.96.
- 13 8. On April 30, 2021, Plaintiff timely filed timely quarterly payroll taxes Form 941 for tax
- 14 periods: 1st Quarter of 2021 with the Internal Revenue Service and paid the reported
- 15 thereon in the amount of \$306,693.62.
- 16
- 17 9. On July 31, 2021, Plaintiff timely filed timely quarterly payroll taxes Form 941 for tax
- 18 periods: 2nd Quarter of 2021 with the Internal Revenue Service and paid the reported
- 19 thereon in the amount of \$336,272.29.
- 20 10. On October 31, 2021, Plaintiff timely filed timely quarterly payroll taxes Form 941 for
- 21 tax periods: 3rd Quarter of 2021 with the Internal Revenue Service and paid the reported
- 22 thereon in the amount of \$320,253.27.
- 23
- 24 11. On approximately February 20, 2022, Plaintiff timely filed timely 941-Xs, claiming the
- 25 Employee Retention Credit for tax periods: 2nd Quarter of 2020, 3rd Quarter of 2020, 4th

Quarter of 2020, 1st Quarter of 2021, 2nd Quarter of 2021, 3rd Quarter of 2021 and 4th Quarter of 2021 with the Internal Revenue Service claiming a total amount of \$3,893,827.71. Please see the chart in the next paragraph for a quarterly breakdown.

12. On further review the correct amount for each quarter should be:

Quarter	Previously Calculated Amount	Corrected Amount
2nd Q 2020	\$558,746.76	\$319,290.97
3rd Q 2020	\$485,709.69	\$7,153.72
4th Q 2020	\$544,169.89	\$32,173.41
1st Q 2021	\$561,902.07	\$446,265.30
2nd Q 2021	\$603,750.52	\$461,396.43
3rd Q 2021	\$561,188.55	\$444,437.44
4th Q 2021	\$578,360.23	\$0.00
Totals	\$3,893,827.71	\$1,710,717.27

13. On September 27, 2023, the Internal Revenue Service denied Plaintiff's claims and assessed \$1,047,611.76 with interest for repayment of 3rd Quarter 2020 and 1st Quarter 2021.

14. The Service assessed the dollar amount above based on the two quarters where refunds were issued to the Plaintiff. 2nd and 4th Quarter of 2020; and 2nd and 3rd Quarter of 2021 where a refund was not issued were denied by the Service and no payment was made.

15. The basis of the assessment was an audit determination that Plaintiff did not qualify for the credit.

16. However, the Plaintiff does qualify for the Employee Retention Credit because the Plaintiff is a corporation that was partially shutdown due to orders from an appropriate governmental authority limiting commerce, travel and/or group meetings.

17. As such, the Service was correct in disallowing a portion of the credit but was incorrect

1 in disallowing the entirety of the credit.

2 18. The Plaintiff acknowledges that they will not qualify for the 4th Quarter of 2021 and as
3 shown in the table above is not seeking the refund originally claimed for this quarter.

4 19. The credits plus interest, that are the subject of this action were erroneously denied
5 and/or illegally assessed and collected from Plaintiff under the internal revenue laws.

6 20. For 2nd and 4th Quarter of 2020 and 2nd and 3rd Quarter of 2021 the Employee Retention
7 Credit was never paid, and Plaintiff timely paid the withholding tax. Thus, the Plaintiff
8 has overpaid the amounts listed in paragraph 12.

9 21. For 3rd Quarter of 2020 Plaintiff made a payment of \$5,000.00 on February 29, 2024.

10 22. For 1st Quarter of 2021 Plaintiff made a payment of \$7,000.00 on February 29, 2024.

11 23. The payments discussed in the previous two paragraphs were made out of an abundance
12 of caution pursuant to the “Divisible Tax Rule” thus creating an overpayment for 3rd
13 Quarter of 2020 and 1st Quarter of 2021.

14 24. After payments were made on February 29, 2024, the Plaintiff submitted two (2) Form
15 843 (Claim for Refund) on March 11, 2024, asking for Immediate Disallowance of the
16 claim. These Form 843s dealt with the two payments above. These claims were
17 ignored by the Service as of the date of this filing. To remedy this situation the Plaintiff
18 mailed a Waiver of the Notice of Disallowance with the original Form 843s on March
19 22, 2024.

20 WHEREFORE, Plaintiff demands judgment in its favor and against the United States:

21 (1) in the amount of \$673,105.51, or such other amount as may be legally refundable,
22 plus interest as provided by law;
23
24
25

1 (2) eliminate the balance owed to the Service in the amount of \$1,047,611.76, plus
2 additional amounts claimed to be owed.

3 (3) for Plaintiffs' costs, attorneys' fees, and such other and further relief as
4 this Court deems appropriate.

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7 Dated: March 27, 2024

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9 Respectfully submitted,

10 /s/ Dennis Evans

11 _____
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